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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Sections 3(n) and 332) GN Docket No. 93-252
of the Communications Act)
)
Regulatory Treatment of Mobile Services)

U S WEST REPLY COMMENTS

U S WEST, Inc. submits this reply to the comments filed in response to the Further Notice of Proposed Rulemaking, FCC 94-100 (May 20, 1994) ("Further Notice").

I. A Major Loophole Must Be Closed: A PCS-ESMR Aggregation Limit Should be Adopted Consistent With the Policy Adopted for PCS-Cellular Aggregation

The Commission has determined that no one should be eligible to acquire more than 40 MHz of broadband PCS spectrum (at 1.8 GHz). Because cellular carriers, with their 25 MHz of spectrum (at 800 MHz), are also free to provide personal communications services in direct competition with PCS licensees, the Commission has likewise restricted the amount of broadband 1.8 GHz spectrum cellular carriers can acquire in areas where they hold 800 MHz spectrum. In essence, the Commission has adopted a PCS-cellular aggregation policy whereby a cellular carrier's 800 MHz spectrum is counted toward the 40 MHz limit on 1.8 GHz PCS spectrum. The effect of this policy is to preclude a cellular carrier from acquiring more than 35 MHz of spectrum before 2000 (and 40 MHz thereafter) to provide broadband personal communications services.

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There is, however, a serious loophole in the current PCS eligibility rules.¹ While "cellular" 800 MHz spectrum is applied towards the 40 MHz PCS spectrum limit, no similar aggregation policy has been adopted for the 800/900 MHz spectrum used by wide-area or enhanced SMR ("ESMR") licensees — even though the services (and spectrum) are comparable and substitutable.² This loophole permits ESMR providers to acquire up to 50% more spectrum than cellular carriers. Specifically, while current rules generally preclude anyone from acquiring more than 40 MHz of spectrum in the provision of broadband PCS, they effectively permit ESMR providers to acquire up to 59 MHz of spectrum to provide the very same PCS services:³

¹This loophole appears to have been established because the Commission continues to use regulatory classifications which no longer reflect accurately marketplace realities (*e.g.*, distinguishing PCS licensees from cellular licensees from ESMR licensees). As one commenter correctly put it:

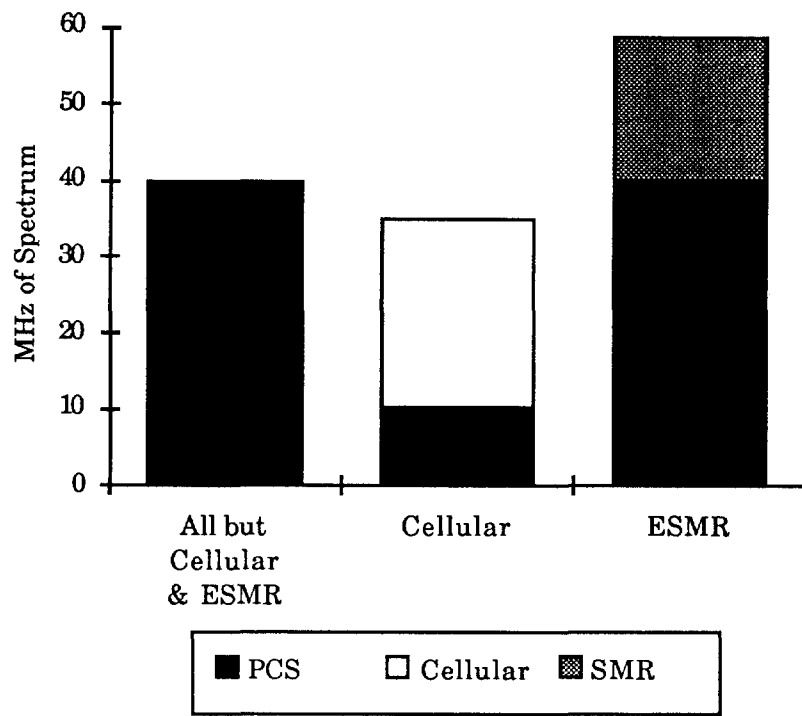
Nextel's experience has been that consumers are interested in services and functions; they are indifferent to regulatory categories. Even in the context of traditional SMR operations, consumers select between the full array of presently existing wireless services and, on a month-to-month basis, constantly migrate from one service to another. We see former cellular and paging subscribers switching to SMR services, and SMR customers moving onto cellular and paging networks. This no doubt reflects a seamless continuum of consumer preferences based on individual evaluations of price, service and functionality.

The emergence of such integrated services [like that provided by cellular, ESMR and PCS licensees] points to the supply-side conclusion that radio spectrum, within certain technical parameters, is a relatively fungible resource that can be used in many ways, although historic licensing and regulatory disabilities impede that fungibility today. Nextel at 24-25.

²ESMR providers can and do offer all the services cellular carriers provide — and more (because cellular carriers remain prohibited from providing dispatch services). In addition, ESMR providers are not subject to any of the additional restrictions discussed in Section II *infra*.

³At present, an SMR licensee can acquire up to 14 MHz in the 800 band, 5 MHz in the 900 band, and 40 MHz in the 1.8 GHz band — for a total of 59 MHz.

Total Spectrum Available for Broadband PCS



ESMR providers obviously will have an enormous competitive advantage over other providers of broadband PCS if they can acquire so much more spectrum than their competitors. To remedy this disparity and thereby further the Congressional regulatory parity directive, a PCS-ESMR aggregation policy should be adopted such that a carrier's ESMR spectrum will be applied toward the 40 MHz PCS spectrum limit.⁴ Moreover, to be meaningful, this PCS-ESMR aggregation policy should be adopted before the broadband PCS auctions commence.

⁴Consistent with the cellular model, the PCS-ESMR aggregation policy would apply only where the ESMR and PCS operations overlap.

U S WEST had asked the Commission to close this loophole in a petition requesting reconsideration of the Broadband PCS Order.⁵ In response, this Commission stated that this matter should be addressed in this proceeding rather than on reconsideration of the general PCS docket.⁶

The predominant ESMR provider, Nextel, which already has a presence in 45 of the 50 largest markets (far more than the largest cellular carrier), makes two arguments why it and other ESMR providers should be permitted to acquire up to 50% more spectrum than other providers of broadband PCS. Neither argument has merit.

Nextel first argues that it should be treated differently from cellular carriers because, while providing comparable services, it says cellular carriers, unlike ESMR providers, supposedly possess market power.⁷ In fact, the courts have held to the contrary,⁸ and the Commission has never concluded that cellular carriers possess market power.⁹

⁵U S WEST Petition for Expedited Partial Reconsideration and for Clarification, GN Docket No. 90-314 (Dec. 8, 1993). U S WEST appends the relevant portion of this Petition (pages 16-22) as Attachment A.

⁶See Broadband PCS Reconsideration Order, GEN Docket No. 90-314, FCC 94-144, at 43 ¶ 104 (June 13, 1994)(We are . . . addressing in another proceeding [*i.e.* Docket 93-252] the eligibility of wide-area SMRs and other commercial radio services to participate in PCS.").

⁷Nextel at 22-28.

⁸See, *e.g.*, Metro Mobile CTS v. NewVector Communications, 892 F.2d 62 (9th Cir. 1989), *aff'g*, 661 F. Supp. 1504 (D. Ariz. 1987)(dismissing antitrust case against a cellular carrier because of the absence of market power).

⁹Indeed, the Commission recently noted that cellular carriers were "non-dominant." See CMRS Second Report and Order, 9 FCC Rcd 1411, 1479 ¶ 178 (March 7, 1994). See also Cellular CPE Bundling Order, 7 FCC Rcd 4028 (June 10, 1992). At one time the Commission did classify cellular carriers as dominant, but it has since acknowledged that, in doing so, "it did not engage in a market analysis at that time." CMRS Second Report at 1470 ¶ 145.

Moreover, the Commission has held that “broadband licensees should be limited to 40 MHz of PCS spectrum in any licensing area.”¹⁰ It adopted this cap “to expand and diversify the CMRS marketplace” and to eliminate even the potential for “mobile services licensees to exert market power by aggregating large amounts of spectrum in a given geographic area.”¹¹

The Commission treated cellular carriers specially in connection with the acquisition of broadband 1.8 GHz spectrum. It adopted PCS-cellular aggregation rules, not because cellular carriers possess market power, but because they would enjoy a competitive advantage if they too were free to acquire another 40 MHz of spectrum — for a total of 65 MHz — in the provision of their personal communications services.¹²

If promotion of diversity and fear of undue market concentration warrant a 40 MHz cap on those providing broadband personal communications services, then the cap should be applied uniformly on all providers of such services — regardless of the regulatory classification that has historically been used with different licensees (*e.g.*, cellular, ESMR or PCS). Moreover, if cellular carriers would be in a position to exercise undue market power in the PCS market if they could acquire 65 MHz of spectrum, then ESMR providers would certainly be in a position to exercise the same power if they are allowed

¹⁰Further Notice at 41 ¶ 88.

¹¹Ibid.

¹²*See, e.g., Broadband PCS Reconsideration Order* at 42-44 ¶ 103 (“[W]e remain convinced that restrictions on in-market cellular providers are necessary to achieve our goal of maximizing the number of new viable and vigorous competitors.”); Further Notice at 41 ¶ 88 (“This limitation on PCS-cellular spectrum aggregation was imposed based on our determination that cellular licensees could otherwise be in a position to exercise undue market power in PCS geographic market.”).

to assemble up to 59 MHz of spectrum while other providers of broadband PCS continue to be limited to 40 MHz only.

Nextel's second argument — ESMR providers should be treated differently from cellular carriers because of differences in cellular and SMR licensing¹³ — is equally defective. How a licensee acquires its spectrum has no bearing whatsoever on the issue of how much total spectrum each provider of broadband PCS should possess — whether to promote diversity or to prevent acquisition of undue market power.

“Congress [has] made clear that its primary objective in revising Section 332 was to assure that functionally equivalent services, i.e., ‘like’ or substitutable services, are regulated similarly, i.e., within the same regulatory classification.” Nextel Reply, Docket No. 93-252, Sum. at i (Nov. 23, 1993).

Regulatory parity is necessary to ensure that no Commission regulation or policy places one service provider at a competitive disadvantage to other similarly situated service providers. Nextel Comments, Docket No. 94-33, at 2.

What is more, the “Commission has the responsibility for assuring that like services are regulated similarly and to promote a competitive mobile communications marketplace.” Nextel Reply, Docket No. 93-252, at 9 (Nov. 23, 1993).

Nextel has readily admitted that it will provide personal communications services on its “SMR” spectrum which will compete with the personal communications services offered by “cellular” and “PCS” carriers. If a 40 MHz cap is warranted for carriers providing such PCS services, as the Commission has held in connection with licensees of “PCS” and “cellular” spec-

¹³See Nextel at 28-31.

trum, then the same cap must be applied to licensees of "SMR" spectrum. The regulatory parity directive of the Budget Act demands no less.

II. The Commission Should Ensure Regulatory Symmetry for All CMRS Providers and Adjust the Level of Its Regulation to Account for the Competitive Nature of the CMRS Market

This rulemaking was commenced to continue discharging the Congressional directive to achieve regulatory parity among CMRS services and service providers. Although the Commission has sought comment "on the degree to which we should conform our technical and operational rules for existing mobile services with our technical and operational rules for PCS,"¹⁴ the focus of the Further Notice is on implementing parity for existing mobile services — that is adopting similar rules for Part 22 and CMRS Part 90 licensees.

U S WEST submits that the Commission's focus, while understandable, is nearsighted in two respects. First, the regulatory parity directive applies to all CMRS services regardless of the particular section under which they are licensed (*e.g.*, Part 22, 24 or 90). If the Commission were to adopt symmetrical technical and operational rules for Part 22 and Part 90 licensees only, without considering the rules applicable to Part 24 licensees, it will then need to commence, in the very near future, another proceeding to harmonize the newly revised Part 22 and 90 rules with the Part 24 rules. Common sense and administrative efficiency would suggest that, to the extent possible, the Commission undertake this symmetry task in one step rather than in two.

¹⁴Further Notice at 6 ¶ 6.

Second, while regulatory parity is critically important to fair and effective competition in the CMRS market, the Commission should not lose sight of the second objective of the Budget Act: adjust the level of regulation to account for the level of competition in the CMRS market so that, to the extent possible, reliance is placed on competitive forces rather than costly regulations.¹⁵

The CMRS market is a competitive market today. No current CMRS provider has market power — that is, "the ability to restrict output and/or raise prices."¹⁶ To the contrary, as has been documented again and again,¹⁷ the CMRS market has experienced declining prices and increased output. Thus, many of the technical and operational rules the Commission adopted, usually at the inception of a particular CMRS service a decade or more ago, may no longer be appropriate for today's relatively mature and increasingly competitive market.

However, the CMRS market will soon become super competitive as a result of several developments. First, the Commission has recently increased by 200% the amount of spectrum available to support CMRS services and, if the auctions proceed as planned, these new CMRS networks (between three

¹⁵As the Commission stated only last week, "[b]y amending Section 332, Congress sought to replace tradition regulation of mobile service with a comprehensive, consistent regulatory framework that gives the Commission flexibility to establish appropriate levels of regulation for mobile radio service providers." CMRS Equal Access and Interconnection Obligations, CC Docket No. 94-54, FCC 94-145, at 3-4 ¶ 2 (July 1, 1994)(emphasis added).

¹⁶*See, e.g., United States v. Western Electric Co.*, 900 F.2d 283, 296 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990).

¹⁷For example, between 1984 and 1992, output of cellular carriers increased by more than one-hundred fold, while the average monthly cellular bill fell by 85%. *See* Memorandum in Support of Motion to Vacate Judgment, Civil Action No. 82-0192, at 45 (July 6, 1994), including Exhibit 5 and supporting affidavits.

and six carriers in each market) could be operational in 18 months. Second, EMSR providers, by introducing frequency re-use techniques and use of digital technologies, have effectively created a third cellular carrier. Finally, current CMRS licensees are increasing dramatically the capacity of their respective networks (by replacing analog with digital technologies). These changes will soon make the CMRS market in this country the most fiercely competitive telecommunications market in the world.

The Commission must, therefore, not only ensure symmetry for all CMRS services, but it must also adjust the degree of its regulatory oversight to account for the super competitive nature of the CMRS market. U S WEST therefore recommends that the Commission, at minimum, take the following three steps:

Step 1: Eliminate All Use and Service-Type Restrictions For All CMRS Providers. The Commission should remove the dispatch restriction imposed on "cellular" licensees (but not on "PCS" and "ESMR" licensees). The only beneficiaries of the current (and disparate) arrangement are current providers of dispatch services, which face less competition than would be the case if the market were freed of out-dated regulatory restrictions.

The Commission should also harmonize among all Part 22, 24 and 90 licensees the restrictions of the provision of "fixed" services, preferably by eliminating such restrictions altogether. Such restrictions have never been enforceable and, with all the additional spectrum being allocated to CMRS, are no longer necessary.

Step 2: Remove All Eligibility Restrictions on CMRS Spectrum. At present, cellular carriers affiliated with telephone companies cannot acquire

SMR licenses, while other cellular carriers (*e.g.*, AT&T/McCaw), PCS licensees, and ESMR providers can. All CMRS providers should be eligible to acquire all CMRS spectrum, subject, of course, to the 40 MHz cap imposed on broadband PCS (applicable to all equally).

Step 3: Modify the Technical Rules Applicable to Part 22 and CMRS Part 90 Licensees to Match Those Applicable to Part 24 Licensees. Part 22 and CMRS Part 90 licensees are subject to a variety of technical rules that have been deemed unnecessary for Part 24 licensees. These detailed rules concern such matters as transmitter construction and operation, maintenance of control points, and responsibility for operational control and maintenance of mobile stations. If these detailed regulations are unnecessary for Part 24 licensees, they are equally unnecessary for Part 22 and CMRS Part 90 licensees which will compete against Part 24 licensees.

In summary, this Commission must not merely conform the technical and operational rules applied to Part 22 and CMRS Part 90 licensees, it must also harmonize the technical and operational rules applicable to all CMRS providers — be they licensed under Part 22, Part 24, or Part 90. What is more, given the competitive (and soon to be super-competitive) state of the CMRS marketplace, the Commission should impose only the minimal regulations necessary so CMRS providers can focus their resources on meeting the public's needs rather than complying with a detailed set of regulations that, for the most part, have no place in a fiercely competitive market.

Respectfully submitted,

U S WEST, Inc.

A handwritten signature in black ink, appearing to read "Jeffrey S. Bork". The signature is written in a cursive, flowing style with a horizontal line drawn underneath the name.

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July 11, 1994

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Amendment of the Commission's)
Rules to Establish New Personal)
Communications Services)

GEN Docket No. 90-314

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**U S WEST PETITION FOR EXPEDITED
PARTIAL RECONSIDERATION AND FOR CLARIFICATION**

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December 8, 1993

manner."³¹ However, the 100-watt base station power limit undermines rather than furthers this objective. This limit will not afford PCS carriers the flexibility the Commission has clearly viewed as critical to the development of PCS. Not only is the PCS power limitation much too restrictive to allow PCS applicants the ability to compete with existing cellular carriers, but such a low-power level will also preclude PCS carriers from offering the many types of services in the many areas that consumers have come to expect from mobile service providers.

II. Any Cellular Eligibility Restrictions Should Also Apply to Equivalent Services, Including ESMR Services

Commission rules limit the amount of PCS spectrum cellular carriers may acquire in MTAs or BTAs where they have a "significant" presence.³² This eligibility restriction is based upon competitive concerns arising from the fact that cellular and PCS services will be comparable — a rationale which necessarily applies to any other service that is substitutable for PCS and cellular. U S WEST accordingly urges the Commission to expand the scope of this eligibility restriction to include providers of Enhanced Specialized Mobile Radio ("ESMR") services — services which the Commis-

³¹PCS Order at 56 ¶ 136.

³²See PCS Order at 45-46 ¶ 105. According to Section 99.204, cellular entities are considered to have a significant presence where more than 10% of the PCS market's population is served by cellular systems in which the cellular entity has more than a 20% ownership interest. Cellular entities meeting the criteria of this provision may acquire only one of the 10 MHz BTA frequency blocks.

sion, ESMR operators and industry analysts all agree are competitive with cellular and PCS.³³

**A. ESMR Services Are Comparable
with PCS and Cellular Services**

ESMR operators are well positioned to compete directly with providers of PCS and cellular services. The first ESMR provider, Nextel Communications (formerly Fleet Call), has stated that it is "pioneering the development of personal communications services in the 800 MHz band through its highly-efficient, wide-area digital Enhanced Specialized Mobile Radio ("ESMR") systems":

ESMR squarely fits within the Commission's proposed definition of PCS as a "family" of mobile radio services for business and individuals that can be integrated with other communications networks. * * * ESMR technology offers an optimum platform for PCS service in the 2 GHz band as well.³⁴

Nextel makes no secret that its ESMR services will be competitive with PCS. In this regard, Nextel's Chairman of the Board acknowledged recently:

[T]here is a definite linkage between the [FCC's] PCS announcements and SMR players We have a terrific opportunity, so why wait until 1997? We have all the characteristics of PCS, but in the 800 MHz band.³⁵

³³This eligibility restriction also should be applied to licensees of Expanded Mobile Service Providers systems to the extent such operators develop systems competitive with PCS, cellular and ESMR services. See Future Development of SMR Systems, 8 FCC Rcd 3950 (June 9, 1993); Nationwide and Regional SMR Systems, 8 FCC Rcd 1469 (Feb. 12, 1993).

³⁴Fleet Call Reply, GEN Docket No. 90-314, at 5-6 (Jan. 8, 1993)(emphasis added).

³⁵"Nextel Strikes Again," Land Mobile Radio News, Vol. 47, No. 44 at 2 (Nov. 12, 1993). See also A. Lindstrom, "Nextel Introduces First U.S. Digital Cellular Network Based on

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Nextel's Chairman has also said that his company is "leapfrogging cellular to become the first wireless operator to offer integrated services Nextel is better positioned than any other to put together a nationwide network using one technology."³⁶

ESMR licensees such as Nextel have been strategically consolidating SMR networks through acquisitions to enhance their positions.³⁷ This consolidation and investment has given Nextel the potential to serve 180 million customers and to establish a presence in 45 of the country's top 50 markets.³⁸ Financial analysts predict that, during the next few years, ESMR providers will capture 10-15% of new cellular subscribers.³⁹

GSM," Communications Week at 47 (Oct. 4, 1993)("Nextel said it essentially will use the digital cellular network to provide personal communications services."); "125 Acquisitions in Six Years: Nextel Gets 2500 SMR Licenses for \$1.7 Billion in Stock Swap," Communications Daily at 2 (Nov. 10, 1993)(According to analysts, the "Nextel network puts it ahead of proposed PCS providers that don't even know how much spectrum they eventually will have to work with Nextel's single-digital standard is 'a clear advantage.'").

³⁶"Nextel Strikes Again," Land Mobile Radio News, Vol. 47, No. 44 at 2 (Nov. 12, 1993).

³⁷"Nextel Strikes Again: Motorola Owns Piece of All the Action," Land Mobile Radio News, Vol. 47, No. 44 (Nov. 12, 1993)("Thanks to its new deal with Motorola . . . Nextel will have a presence in 45 of the nation's top 50 markets . . . giving the cellular and personal communications services (PCS) industry something to ponder."). In addition to its acquisition of the Motorola licenses, Nextel has recently acquired properties from PowerFone, Advanced MobileComm, Questar, and CenCall. Ibid.

³⁸"125 Acquisitions in Six Years: Nextel Gets 2500 SMR Licenses for \$1.7 Billion in Stock Swap," Communications Daily at 2 (Nov. 10, 1993). Nextel already has domestic and international strategic partners in Motorola, Matsushita, Comcast, Northern Telecom, and Nippon Telegraph and Telephone. There is further speculation that MCI may enter into a venture with Nextel. See, e.g., J. Silva, "Could Nextel be 'Next Big Thing' in Mega-deals?," Radio Communications Report (Nov. 22, 1993); "125 Acquisitions in 6 Years: Nextel Gets 2,500 SMR Licenses for \$1.7 Billion in Stock Swap," Communications Daily, at 2 (Nov. 10, 1993); L. Kehoe, "Motorola and Nextel \$1.8 Billion Mobile Radio Deal," Financial Times at 28 (Nov. 10, 1993).

³⁹P. Apodaca, "Mobile Radio Firms Take on Cellular Market," L.A. Times at 4 (Oct. 26, 1993).

The Commission, too, is well aware of the expansive capabilities of ESMR, noting that "[r]ecent trends in the SMR service reflect that private carrier land mobile providers have begun to emerge as innovative and viable competitors to common carrier land mobile offerings."⁴⁰ Indeed, the Commission has announced that the regulatory scheme it adopted for PCS "ensures that PCS will have the potential to compete with existing mobile radio services such as cellular and special mobile radio service."⁴¹ Moreover, industry analysts agree that ESMR service is comparable to cellular,⁴² and similar views were expressed by numerous commenters in the regulatory parity proceeding.⁴³

⁴⁰SMR Eligibility Order, 7 FCC Rcd 4398, 4399 at ¶ 4 (July 15, 1992). See also Private Land Mobile Services, 7 FCC Rcd 4484, 4488 at ¶ 16 (July 16, 1992).

⁴¹PCS Order at 35 ¶ 78.

⁴²See, e.g., "Nextel to Expand Acquisition Spree with PowerFone," Wall St. J. at B9 (Oct. 28, 1993)("Nextel and its primary competitors, Dial Page, Inc. of Atlanta and CenCall Communications, Inc. of Denver . . . are likely to compete with established cellular players in many large urban markets."); J. Kitchen, "How Mobile Radio Challenges Cellular," N.Y. Times at 22 (Sept. 29, 1993)("[A]dditional frequency capacity will [enable ESMR to offer] consumers more communications choices and services than are available through cellular."); E. Andrews, "Radio Dispatchers Set to Rival Cellular Phones," N.Y. Times at D4 (Nov. 5, 1993); S. Besen et al., Charles River Associates, "An Economic Analysis of Entry by Cellular Operators into Personal Communications Services," submitted as Attachment A to CTIA Comments in GEN Docket No. 90-314, at 10 (Nov. 1992)(Introduction of ESMR into the mobile services marketplace viewed as a source of competitive pressure on cellular providers); A. Ramirez, "A Challenge to Cellular's Foothold," N.Y. Times at D1 (April 1, 1993)(describing ESMR as a "potentially power competitor to the \$9 billion cellular industry"); C. Lazzareschi and J. Shiver, "The Latest Wireless Device is Simply a Radio Frequency and a Potential \$40 Billion Market," L.A. Times at D2 (Sept. 23, 1993)("Cellular . . . will soon have competition from something called . . . SMR"); E. Andrews, "A Wireless Upstart Gets Bigger," N.Y. Times at D1 (Nov. 10, 1993)("[U]pstart company [Nextel] acquired the capstone for a nationwide network that could give cellular phone companies and giants like AT&T a run for their money.").

⁴³See Regulatory Parity Rulemaking, GEN Docket No. 93-252, FCC 93-454 (Oct. 8, 1993). See also Comments filed by Century Cellunet at 3-4 ("ESMR licensees are recognized to be

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There is, in summary, no dispute that cellular and ESMR services are competitive with each other.

B. The Considerations Underlying the Cellular Eligibility Restriction Apply with Equal Force to ESMR Operators

The Commission has expressed reservations about allowing cellular operators to acquire PCS spectrum in their service areas from the inception of this proceeding.⁴⁴ Noting that PCS and cellular licensees "will compete on price and quality,"⁴⁵ the Commission concluded that "competitive benefits may be reduced if cellular incumbents are permitted to acquire PCS licenses within their service areas":

Incumbent cellular operators might limit entry for some period of time by acquiring licenses from potential competitors (either after issuance by lottery or comparative hearing, via the resale market, or initially, if licenses are competitively bid). This would reduce the number of independent competitors in the market and raise antitrust concerns.⁴⁶

The Commission ultimately decided to allow cellular operators to acquire only a 10 MHz PCS frequency block in their service areas to "insure that the remaining PCS spectrum is available for competitors."⁴⁷

fully competitive with cellular"); Telocator at 13 ("In most markets today, there are cellular carriers, cellular resellers, ESMRs, and SMRs competing with each other"); CTIA at 21 ("ESMR serves as a competitive alternative to cellular service"); Sprint at 18-20; AMTA at 6; Comcast at 9; Harrisonville at 4; InterDigital at 15; Kerrville at 4; Cellular Communications at 8; TDS at 13; Vanguard at 3, 18.

⁴⁴See, e.g., PCS Notice of Inquiry, 5 FCC Rcd 3995, 3999 at ¶ 27 (June 28, 1990).

⁴⁵PCS Notice of Proposed Rulemaking, 7 FCC Rcd 5676, 5701 ¶ 63 (Aug. 14, 1992).

⁴⁶*Id.* at 5702 ¶ 64.

⁴⁷PCS Order at 46 ¶ 106.

The same reasons that led the Commission to limit cellular eligibility for PCS licenses apply to ESMR services, as the two sets of services are competitive. Consequently, ESMR operators should likewise be subject to the same PCS eligibility restrictions applicable to cellular.

This very argument was raised earlier in this proceeding by McCaw:

The Commission notes that new 2 GHz PCS licensees will compete with other services, including "cellular services . . . [and] specialized mobile radio services." Under these circumstances, if the Commission's competitive rationale is accepted, other spectrum providers holding spectrum for mobile services, including SMRs and ESMRs, also should be barred.⁴⁸

The Commission's failure to address this point in the PCS Order suggests that McCaw's position was simply overlooked.

In any event, the need to impose an eligibility restriction on ESMR operators has become even more compelling given the abandonment of the original proposal to establish three, rather than two, 30 MHz PCS frequency blocks.⁴⁹ With one less 30 MHz block available, allowing a facilities-based ESMR operator to acquire a large block of PCS spectrum in its service area will further limit entry opportunities for other competitors.

Finally, applying the same set of rules to ESMR that are applied to cellular is consistent with the recent Congressional directive mandating that similarly-situated entities should be subject to the same regulatory

⁴⁸McCaw Comments, GEN Docket No. 90-314, at 32 (Nov. 9, 1992). See also Bell Atlantic Reply, GEN Docket No. 90-314, at 12 n.23 (Jan. 8, 1993) ("The proposed disparate treatment of cellular . . . relative to SMR and ESMR is virtually impossible to justify on a principled basis.").

⁴⁹See PCS Notice, 7 FCC Rcd at 5691 ¶ 37.

scheme.⁵⁰ Establishment of a PCS regulatory environment which affords preferable treatment to ESMR providers over cellular providers would be inconsistent with this clearly-stated objective.

Given the consensus that ESMR and cellular services are virtually identical and given the Congressional directive that similar services should be accorded similar regulatory treatment, the Commission should subject all such providers to the same PCS eligibility restrictions.

III. Conforming and Other Amendments to the Part 99 Rules are Appropriate

The Commission has adopted new Part 99 rules governing the general filing requirements and technical standards applicable to both narrowband and broadband PCS. These new rules, while establishing a regulatory framework for many important aspects of PCS operations, are not complete. To fill some of the gaps, the Commission has used the Competitive Bidding Rulemaking as a vehicle to propose other rules for PCS that will be integrated into Part 99.⁵¹ However, some of these additional rules, which are borrowed from Part 22, are inconsistent with rules specifically adopted in the PCS Order, while others have no relevance in the PCS con-

⁵⁰See Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993). Congress has directed the Commission "to ensure that such regulation is consistent with the overall intent of this subsection . . . so that, consistent with the public interest, similar services are accorded similar regulatory treatment." H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 494, *reprinted in* 1993 U.S. Code Cong. & Admin. News, 1088, 1183.

⁵¹See Competitive Bidding Rulemaking, PP Docket No. 93-253, FCC 93-455, at 43 ¶ 128 (Oct. 12, 1993) ("In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3 - 22.45 and 22.917(f), and 22.918 - 22.945.").

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 11th day of July, 1994, I have caused a copy of the foregoing **U S WEST REPLY COMMENTS** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

***Via Hand-Delivery**

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